BEFORE THE
TENNESSEE STATE BOARD OF EQUALIZATION

In Re:	Trust Marketing Comm. Consortium Inc. Personal Property Account No. P-117810 *Back Assessment/Reassessment* Tax year 1999	))))	Shelby County

INITIAL DECISION AND ORDER

Statement of the Case

The Shelby County Assessor of Property ("Assessor") made the following back assessment/reassessment of the subject property:

Original Assessment	Revised Assessment	Back Assessment/ Reassessment
$26,520	$160,200	$133,680

On October 2, 2006, an appeal was filed on the taxpayer's behalf with the State Board of Equalization ("State Board"). The Assessor has moved to dismiss the appeal on the ground it was untimely.

The undersigned administrative judge conducted a jurisdictional hearing of this matter on August 28, 2007 in Memphis. The appellant, Trust Marketing & Communications Consortium, Inc. ("TMCC"), was represented by David C. Scruggs, Esq. and registered agent Suzanne Allen, of Evans & Petree, PC (Memphis). John Zelinka, counsel to the Assessor, appeared on her behalf along with Audit Manager Eric Beaupre.

Findings of Fact and Conclusions of Law

The jurisdictional issue raised by this appeal parallels that addressed by the undersigned administrative judge in Memphis Networx, LLC (Shelby County, Tax Years 2003 & 2004, Initial Decision and Order). A copy of that initial order is attached hereto for reference.

Following an audit of this non-reporting account, the Assessor levied a back assessment/reassessment thereof in the amount shown above on September 16, 2003. Due apparently to misinterpretation of a recently-enacted tolling statute[1], this back assessment/reassessment was made some 155 days after the deadline established in Tenn. Code Ann. section 67-1-1005(a).

[1]Tenn. Code Ann. section 67-1-1005(d) tolls the deadline for initiating a back assessment/reassessment from the issuance of the notice of audit until the issuance of the audit findings. *See*, e.g., Sharp Manufacturing Company of America (Shelby County, Tax Year 2000, Initial Decision and Order, November 1, 2005); Pittco, Inc. (Shelby County, Tax Years 2002—2004, Initial Decision and Order, February 17, 2005).

The notice of back assessment/reassessment mailed to the taxpayer included a statement of its right of appeal to the State Board "within (60) days from the date of this certification."[2] Inexplicably, over three years elapsed before this complaint was lodged. Nevertheless, relying on the same authorities adduced in the Memphis Networx case, counsel for TMCC maintains that the State Board may act on this so-called "collateral attack" on the back assessment/reassessment.

For the reasons stated in Memphis Networx, the administrative judge does not read Tenn. Atty. Gen. Op. 92-62 as saying that the statutory deadline for appealing an assessor's action to the State Board is somehow extended indefinitely if such action is alleged to be "outside the powers conferred expressly by statute or outside of the applicable statute of limitations to exercise those powers." Taxpayer's Memorandum in Support of Request for Jurisdiction, p. 2. Nor may this particular complaint – brought in the same forum and presumably for the same purpose that a timely appeal under Tenn. Code Ann. section 67-1-1005(b) would have been pursued – properly be considered a *collateral attack* on the back assessment/reassessment of which the taxpayer was long ago notified.

To whatever extent the decisions of Administrative Judge Mark J. Minsky in Cedars International Ltd. (Shelby County, Tax Years 1991 & 1992, Initial Decision and Order, July 26, 2001) and Curtis O. and Patricia A. Hopkins (Shelby County, Tax Years 1993 & 1994, Initial Decision and Order, October 9, 1995) may be construed as in conflict with this opinion, the undersigned administrative judge respectfully takes a different view.

Order

It is, therefore, ORDERED that this appeal be dismissed for lack of jurisdiction.

Pursuant to the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301—325, Tenn. Code Ann. § 67-5-1501, and the Rules of Contested Case Procedure of the State Board of Equalization, the parties are advised of the following remedies:

1. A party may appeal this decision and order to the Assessment Appeals Commission pursuant to Tenn. Code Ann. § 67-5-1501 and Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization. Tennessee Code Annotated § 67-5-1501(c) provides that an appeal **"must be filed within thirty (30) days from the date the initial decision is sent."** Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization provides that the appeal be filed with the Executive Secretary of the State Board and that the appeal **"identify the allegedly erroneous finding(s) of fact and/or conclusion(s) of law in the initial order"**; or

[2] *See* Tenn. Code Ann. section 67-1-1005(b).

2. A party may petition for reconsideration of this decision and order pursuant to Tenn. Code Ann. § 4-5-317 within fifteen (15) days of the entry of the order. The petition for reconsideration must state the specific grounds upon which relief is requested. The filing of a petition for reconsideration is not a prerequisite for seeking administrative or judicial review.

This order does not become final until an official certificate is issued by the Assessment Appeals Commission. Official certificates are normally issued seventy-five (75) days after the entry of the initial decision and order if no party has appealed.

ENTERED this 26th day of September, 2007.

Pete Loesch

PETE LOESCH
ADMINISTRATIVE JUDGE
TENNESSEE DEPARTMENT OF STATE
ADMINISTRATIVE PROCEDURES DIVISION

cc: David C. Scruggs, Attorney, Evans & Petree, PC
Tameaka Stanton-Riley, Appeals Manager, Shelby County Assessor's Office

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BEFORE THE
TENNESSEE STATE BOARD OF EQUALIZATION

In Re:	Memphis Networx, LLC Personal Property Account No. P-172251 Tax years 2003, 2004	)))	Shelby County

INITIAL DECISION AND ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND GRANTING MOTION TO DISMISS

Statement of the Case

The Shelby County Assessor of Property ("Assessor") valued the subject property for tax purposes as follows:

TAX YEAR	APPRAISAL	ASSESSMENT
2003	$2,797,300	$839,190
2004	$2,354,500	$706,350

On July 21, 2006, appeals were filed on behalf of the taxpayer with the State Board of Equalization ('State Board"). The taxpayer's attorneys, David C. Scruggs and Andrew H. Raines of Evans & Petree, PC (Memphis), filed a motion for summary judgment with a supporting memorandum on June 29, 2007. By notice dated July 16, 2007, the undersigned administrative judge set this motion for hearing on August 28, 2007 in Memphis. On August 17, 2007, counsel for the Assessor filed a response opposing the motion for summary judgment and seeking dismissal of these appeals.

The appellant Memphis Networx, LLC ("Memphis Networx") was represented at the hearing by Mr. Scruggs and registered agent Suzanne Allen. John Zelinka, counsel for the Assessor, appeared on her behalf along with Audit Manager Eric Beaupre.

Findings of Fact and Conclusions of Law

Memphis Networx is a telecommunications company whose property is entirely assessable by the Comptroller of the Treasury pursuant to Tenn. Code Ann. sections 67-5-1301 *et seq.* In tax years 2003 through 2006, apparently on the mistaken belief that Memphis Networx belonged on the "commercial and industrial" assessment roll, the Assessor's office mailed tangible personal property schedules and instructions to the company at its Bluff City address. Memphis Networx timely completed and returned those schedules; and the reported property was assessed accordingly.

In July, 2006, Memphis Networx finally apprehended that the subject property was not locally assessable.[1] Presumably under authority of Tenn. Code Ann. section 67-5-509, the Assessor deleted the assessments for tax years 2005 and 2006; but she declined to adjust the values shown above for the two prior tax years.[2] These complaints to the State Board ensued.

Memphis Networx concedes that these appeals were filed after the applicable statutory deadlines.[3] Nevertheless, relying on several decisions of Administrative Judge Mark J. Minsky as well as Tenn. Atty. Gen. Op. 92-62 (October 8, 1992), the taxpayer argues that the State Board has jurisdiction to set aside the disputed assessments because the Assessor exceeded her statutory authority in making them.

The aforementioned opinion of the Attorney General has often been cited for the fundamental principle that:

> The requirement that a taxpayer must generally file an appeal with the local board of equalization, like the time deadline for filing an appeal, is a jurisdictional prerequisite which cannot be waived by the consent of the parties. The statutory scheme represents a specific and detailed procedure by which appeals of property tax cases are heard and, absent express statutory provisions otherwise, must be complied with by the taxpayer. [Citation omitted.]

Id. at p. 10.

Thus, for example, in Homelife Oxygen, LLC (Shelby County, Tax Year 2001, Final Decision and Order, February 7, 2006), the Assessment Appeals Commission affirmed Judge Minsky's *sua sponte* dismissal of an untimely appeal from a back assessment/reassessment of tangible personal property for which he had "found no legal basis." *Id.* at p. 1.

More recently, Chancellor Ellen Hobbs Lyle upheld the State Board's refusal to hear a direct appeal of an assessment for tax year 2005 that was not filed until August of 2006. VN Hotel Investors, LLC v. Tennessee State Board of Equalization *et al.* (Twentieth Judicial District, Davidson County, Part III, No. 06-2664-III, September 4, 2007). In that case, the plaintiff had purchased the property in question in July, 2005; and the tax bill for that year was mailed to prior owner. The court concluded in its Memorandum and Order that:

> ...March 1, 2006, was the last possible date on which the (State) Board could accept appeal forms. Under the statute **this is true even in cases where the taxpayer claims that it was not notified of the assessment in time to appeal to either the local board or the state board**. Under the statute, although the (State) Board has been given authority to accept appeal forms from taxpayers up to March 1 of the following year in certain cases, **no**

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[1] *See* Tenn. Code Ann. section 67-5-502(a)(1).

[2] The Comptroller of the Treasury assessed the property of Memphis Networx in tax years 2003 and 2004 at $5,000,000 and $5,400,000, respectively. Exhibit A to Taxpayer's Motion for Summary Judgment.

[3] *See* Tenn. Code Ann. sections 67-5-1407 and 67-5-1407.

> **statutory authority exists for the (State) Board to accept appeal forms after March 1 for any reason**. [Emphasis added.]

Id. at p. 4. *See also* Christ the Rock Church (Shelby County, Tax Year 1993, Final Decision and Order, August 1, 1996).

Memphis Networx focuses on a less familiar part of Tenn. Atty. Gen. Op. 92-62 which dealt with the question of whether deadlines for appeals to the State Board may be tolled under certain circumstances. That portion of the opinion reads (in relevant part) as follows:

> Decisions of **administrative agencies and boards**, like those of courts, are entitled to *res judicata* effect and thus are conclusive between the same parties on the same cause of action not only as to all matters litigated, but as to all matters which could have been litigated, in the proceeding. [Citations omitted.]
>
> Accordingly, orders entered by **administrative agencies and boards, such as the State Board of Equalization or local boards of equalization**, acting within their jurisdiction are not subject to collateral attack in the absence of unusual circumstances such as lack of jurisdiction, fraud or lack of constitutional due process. [Emphasis added.]

Id. at p. 12.[4]

Mr. Scruggs characterizes these direct appeals to the State Board as a cognizable "collateral attack outside of the appeals process" on "void" assessments which the Assessor lacked jurisdiction to make. Taxpayer's Memorandum in Support of Motion for Summary Judgment, pp. 2—3. In his view, the ill-fated appeal in Homelife Oxygen was distinguishable because it only involved the *valuation* of the taxpayer's property – not the legal *validity* of the assessment.[5]

The appellant's position seemingly draws some support from Cedars International Ltd. (Shelby County, Tax Years 1991 & 1992, Initial Decision and Order, July 26, 2001). At issue in that case were corrections of so called "errors" which the Assessor had initiated after the deadline imposed in Tenn. Code Ann. section 67-5-509(d). Judge Minsky opined that:

> ...[I]t is unnecessary to determine whether the taxpayer's appeal was timely under subsection (e). [Footnote omitted.] For the reasons stated in *Curtis O. & Patricia A. Hopkins* (Shelby Co., Tax Years 1993 and 1994), the administrative judge finds that if the assessor's purported correction is void it is subject to collateral attack.

Id. at p. 2.

In the Hopkins case, Judge Minsky had held that the Assessor's correction of a purported error was really a back assessment (of an omitted improvement) which "was void and could be collaterally attacked." *Id.* at p. 3.

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[4]"Mere irregularities or errors of law or fact," the opinion continues, "are not subject to collateral attack."

[5]More specifically, the taxpayer had challenged an audit finding which resulted in a step-up in basis.

For whatever reason, no exception was taken to the Cedars International or Hopkins decisions; nor did the Assessment Appeals Commission or the State Board exercise its discretion to review either of them. Hence official certificates adopting Judge's Minsky's recommended values were issued to the affected parties. Therefore, Mr. Scruggs maintained, those decisions became the binding "law" of the agency.

The undersigned administrative judge respectfully, but emphatically, disagrees. Members of the State Board and the Assessment Appeals Commission would surely not consider the multitude of initial orders (entered by administrative judges sitting alone) which routinely become final orders without protest to be as authoritative as the decisions actually rendered by those appellate bodies. Nor, for that matter, would Judge Minsky himself likely feel constrained to abide by any opinion of this colleague which happened not to be appealed or reviewed.

Implicit in the Cedars International and Hopkins rulings was the premise that the Assessor's office constituted an "administrative agency" within the purview of the highlighted excerpts from Tenn. Atty. Gen. Op. 92-62. Yet, unlike a local board of equalization or an "agency" covered by the state's Uniform Administrative Procedures Act (UAPA),[6] an assessor is not required to afford a taxpayer the opportunity for a hearing before determining a classification or assessment of property. To be sure, the "jurisdiction" of an assessing authority is statutorily limited by geographic boundaries and various deadlines. But the Attorney General was referring to "administrative agencies and boards" in explanation of his opinion that:

> A decision of a **local board of equalization** not timely appealed to the State Board of Equalization is not subject to collateral attack by the parties to the judgment except under unusual or extraordinary circumstances rendering the decision void, such as lack of jurisdiction, fraud or failure to comply with state and federal constitutional due process requirements. **While such circumstances do not toll the time for filing an appeal to the State Board**, they do render the underlying decision void and subject to collateral attack. The State Board, which is responsible for reviewing the actions of the **local boards**, should accept, review and enter a final decision on any petition seeking to make a collateral attack on any decision of a **local board**...[Emphasis added.]

Id. at pp. 2—3.

In the context of the Attorney General's analysis on this point, then, the word "jurisdiction" must be deemed to mean the power of a *judicial or quasi-judicial tribunal* to decide a dispute between adverse parties (subject to minimum due process standards). The Assessor's office, of course, is not even a quasi-judicial one.

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[6]Section 4-5-102(2) of the UAPA defines an *agency* as "each state board, commission, committee, department, officer, or any other unit of state government authorized or required by any statute or constitutional provision to make rules or to determine contested cases."

Moreover, in the opinion of this administrative judge, these appeals plainly do not qualify as a "collateral attack" on the disputed assessments. The quoted term is defined in *Black's Law Dictionary* (6th ed. 1990) as follows:

> With respect to a **judicial proceeding**, an attempt to avoid, defeat, or evade it, or deny its force and effect, **in some incidental proceeding not provided by law by law for the express purpose of attacking it**. [Citation omitted.] An attack on a **judgment** in any manner **other than by action or proceeding, whose very purpose is to impeach or overturn the judgment**; or, stated affirmatively, a collateral attack on a **judgment** is an attack **made by or in an action or proceeding that has an independent purpose other than impeaching or overturning the judgment**. [Citation omitted.]

Id. at p. 261. [Emphasis added.]

This proceeding was initiated by the taxpayer solely for the very purpose of "impeaching or overturning" the assessments of the self-reported property in question. Unfortunately, due to its own ignorance or neglect rather than any lack of notice of such assessments, Memphis Networx did not pursue the administrative remedy which the law provided for contesting these assessments within the allotted time. Counsel for the appellant posits the existence of an indeterminate period thereafter within which the State Board – whose powers and duties are no less circumscribed by statute than those of the Assessor – may invalidate an erroneous property assessment. The administrative judge cannot conceive that the legislature ever intended to create such an open-ended right of appeal to this agency "outside of the appeals process."

Order

It is, therefore, ORDERED that the taxpayer's motion for summary judgment be denied, and that these appeals be dismissed for lack of jurisdiction.

Pursuant to the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301—325, Tenn. Code Ann. § 67-5-1501, and the Rules of Contested Case Procedure of the State Board of Equalization, the parties are advised of the following remedies:

1. A party may appeal this decision and order to the Assessment Appeals Commission pursuant to Tenn. Code Ann. § 67-5-1501 and Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization. Tennessee Code Annotated § 67-5-1501(c) provides that an appeal **"must be filed within thirty (30) days from the date the initial decision is sent."** Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization provides that the appeal be filed with the Executive Secretary of the State Board and that the appeal **"identify the allegedly erroneous finding(s) of fact and/or conclusion(s) of law in the initial order"**; or

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